86-841

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1986

BATH IRON WORKS CORPORATION,

and

COMMERCIAL UNION INSURANCE COMPANY,
Petitioners

v.

BRUCE E. BOUFORD
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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QUESTION PRESENTED

Whether the Maine Supreme Judicial Court was correct in ruling that the federal doctrine of concurrent jurisdiction does not entitle an employer that has paid workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act to a credit, in the full amount of benefits paid, against benefits owed the same employee for the same injury under a state workers' compensation scheme.

LIST OF PARTIES*

The parties in this case when it was presented to the Maine Supreme Judicial Court, Docket No. WCC 86-27, were Bath Iron Works Corporation and Commercial Union Companies, appellants and Bruce E. Bouford, appellee.

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*Petitioner, Bath Iron Works Corporation, reports, pursuant to Rule 28.1 of the Rules of this Court that it was a wholly owned subsidiary of Congoleum Corporation at the time of Mr. Bouford's injury. It is now a wholly owned subsidiary of Bath Acquisition Corporation, which in turn is owned by Bath Holding Corporation.

Petitioner Commercial Union Insurance Company, reports, pursuant to Rule 28.1 of the Rules of this Court, that it is a wholly owned subsidiary of Commercial Union Insurance Companies. It has the following affiliates; American Employer's Insurance Company, Employer's Fire Insurance Company, Northern Assurance Company of America, Commercial Union Custom Insurance Comany, American Central Insurance Company, and Commercial Union Life Insurance Company of America.

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No. _____

BATH IRON WORKS CORPORATION

and

COMMERCIAL UNION COMPANY,

Petitioners

v.

BRUCE E. BOUFORD,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE MAINE SUPREME JUDICIAL COURT

Petitioners Bath Iron Works Corporation (Bath) and Commercial Union Company (Commercial Union) pray that a writ of certiorari issue to review the judgment of the Maine Supreme Judicial

Court entered on August 27, 1986 in Bruce E. Bouford v. Bath Iron Works, et al. That judgment affirmed a decision of the Appellate Division of the Maine Workers' Compensation Commission ordering Bath to pay its employee benefits under the Maine Workers' Compensation Act and denying Bath a credit against the state benefits in the full amount of benefits paid under the Federal Longshore and Harbor Workers' Compensation Act for the same injury.

OPINIONS BELOW

The Maine Supreme Judicial Court has issued an opinion in this case, a copy of which appears in Appendix A to this Petition (App. A, pp. 1a-23a). The Opinion has not been reported. A copy of the judgment of the Maine Supreme Judicial Court appears in the Appendix at page 16a. The Decision and Order of the Appellate Division of the Maine Workers' Compensation Commission appears as Appendix B (App. B, pp. 24a-33a). The Findings of Fact and Conclusions of Law of the Workers' Compensation Commissioner in the State of Maine who originally decided this case are set forth in Appendix C (App. C, pp. 34a-38a), and the original Decree of the Workers' Compensation Commissioner who heard this case is set forth in Appendix D (App. D, pp.39a-44a).

Prior to the State litigation that has produced this Petition for a Writ of Certiorari, this matter was litigated in the context of a Longshore and Harbor Workers' Compensation claim, and the Decision and Order of the Administrative Law Judge (Case No. 80-LHCA-1369), issued on January 23, 1981, appears in Appendix E (App. E, pp. 45a-80a).

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on August 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

RELEVANT STATUTES

The relevant statutory provisions are set forth in Appendices F and G. This case involves 39 M.R.S.A. §§54, 55, 56, 56-A (Appendix F), and 33 U.S.C. §903(e), §908(c) (Appendix G).

STATEMENT OF THE CASE

The United States Supreme Court has determined that state workers' compensation acts are not pre-empted by the Federal Longshore and Harbor Workers' Compensation Act. Calbeck v. Travelers Insurance Company, 370 U.S. 114 (1962); Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980). Essential to the formulation of the doctrine of concurrent jurisdiction was the principal that the remedies afforded by state and federal workers' compensation schemes are complementary rather than inconsistent because an employee is prevented from receiving a double recovery of benefits by virture of a credit given to an employer in the amount of payments received by the employee under one compensation scheme against a subsequent order to pay benefits under the alternate system of benefits.

In this case, the Maine Supreme Judicial Court applied the federal doctrine of concurrent jurisdiction but refused to grant to Bath a full credit for federal payments already issued for the same injury. If allowed to stand, the decision of the Maine Court will have far reaching consequences in the form of thousands of double recoveries and a proliferation of litigation dealing with comparative analyses of inconsistent benefits in various state and federal compensation schemes.

The essential facts of this case are undisputed. Bruce E. Bouford injured his back on August 16, 1978 while working for Bath Iron Works. He initially pursued a claim for workers' compensation benefits under the Federal Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. §901 et seq. The Employer contested the Employee's federal claim

and the matter was heard by a Federal Administrative Law Judge in August of 1980.

The Administrative Law Judge issued a Decision and Order on January 23, 1981. (Appendix E, pp. 45a-80a). The Administrative Law Judge found that the Employee suffered an injury on August 16, 1978 which resulted in herniation of the L5-S1 lumbar disc. The Judge took into consideration the Employee's treating physician's evaluation of the Employee's "permanent impairment at '25% loss as it relates to the whole man or 50% loss of the back'" and found that the Employee had "a 25% permanent partial disability as to the 'whole man' and 50% permanent disability to the back." (Appendix 54a).

The Decision and Order of the Administrative Law Judge continued on to find:

Maximum improvement has been reached. The patient has recurring episodes of low back pain, which seem to be related to heavy lifting on different occasions. The doctor said this vulnerability will continue in the future. He will always have some permanent impairment which relates back to the August 16, 1978 accident. . . . [B]ased upon the claimant's testimony and the reports of the attending physicians, I find that between the date he returned to work, August 19, 1979 and February 4, 1980, the date his disability was found to be permanent in nature, the claimant was temporarily partially disabled as a result of his August 16, 1978 job related accident. I conclude that beginning on February 4, 1980 and continuing thereafter the claimant has been permanently partially disabled by the sequelae of that accident. . . .

[T]he claimant should be paid compensation benefits at the rate of $64.32 per week by reason of the temporary and permanent disability he suffered as a result of the injuries sustained in August 16, 1978. 33 U.S.C. §908(c)(21). . . .

(Appendix pp. 59a, 60a, 63a).

The Administrative Law Judge ultimately concluded that the Employee was entitled to temporary total disability from August 18, 1978 to March 18, 1979. He went on to conclude that from March 19, 1979 and continuing the Employee was entitled to benefits for permanent partial disability at the rate of $64.32. It is undisputed that the Employee has received those payments under the Federal Act and continues to do so.

In 1984, the Employee filed a Petition for Award of Compensation with the Maine Workers' Compensation Commission. In addition, the Employee filed a Petition seeking an award for benefits as a result of permanent impairment he sustained from the August, 1978 injury.

After hearing the State Commission granted the Petitions brought by the Employee and ordered payment of compensation for incapacity from March of 1979 to the present and continuing in an amount of $40.13 per week, plus inflation adjustments. That amount was less than the ongoing benefits the Employee was receiving under the Federal Longshore Act. In regard to weekly compensation benefits, the Commission ordered " . . . the insurer is entitled to a credit for federal compensation benefits paid during these weeks of incapacity." (Appendix p. 44a). In addition, the Commissioner ordered the Employer to pay the Employee a lump sum of $16,053 for permanent impairment.

Bath moved for findings on the issue of the extent of the credit against the award for permanent impairment. It asserted that it was entitled to a credit

against all portions of the State Order in the amount of all federal payments made to the Employee for benefits under the Longshore Act for the same injury. The Commissioner, however, held that the Employer was not entitled to any offset for Longshore payments against the award for permanent impairment. (Appendix C, p. 36a). He reached this conclusion based upon his determination that ". . . Federal Workers' Compensation laws do not provide such a benefit." Id.

Bath Iron Works appealed to the Appellate Division of the State Workers' Compensation Commission arguing that the decision below violated the federal doctrine of concurrent jurisdiction and that the Commission erroneously concluded that the State obligation to pay permanent impairment benefits was not subject to a credit for payments made under the federal statutory scheme. The

Appellate Division of the Maine Workers' Compensation Commission, however, affirmed the ruling of the single Commissioner. (Appendix B).

The Employer filed a Petition for Appellate Review which was granted by the Maine Supreme Judicial Court. With two Justices dissenting, that Court affirmed the decision of the Appellate Division and denied the Employer a full credit against the state workers' compensation obligation for federal payments previously made for the same injury.

STAGES AT WHICH FEDERAL QUESTIONS WERE RAISED AND PRESERVED

As the foregoing statement of the case indicates, the Petitioners have contended at every stage of litigation that they were entitled, as a matter of federal law, to a full credit in the amount of all payments made to the

Employee for federal workers' compensation benefits against any subsequent order of payment of state compensation benefits for the same injury. Moreover, as the decisions set forth in the Appendix indicate, the initial factfinder in the form of a single State Workers' Compensation Commissioner, the State Appellate Division of the Workers' Compensation Commission, and the State of Maine Supreme Judicial Court have all specifically considered and ruled upon the issues presented in this Petition. (Appendix A, B, C, D).

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3) to pass upon the federal issues that were ruled upon by the Maine Supreme Judicial Court.

ARGUMENT

I. INTRODUCTION TO ARGUMENT.

This case presents the Court with an issue that goes to the heart of the federal doctrine of concurrent jurisdiction with regard to the Federal Longshore and Harbor Workers' Compensation Act and State Workers' Compensation schemes. Both the federal and state statutory provisions are designed to compensate injured workers. Sun Ship, supra; Stockford v. Bath Iron Works Corp., 482 A.2d 843 (Me. 1984). Despite the different terminology used in each Act to describe the nature of the benefits awarded, and despite the different structure of the two benefit schemes, "payments under the Longshoremen's Act are essentially equivalent to [state workers' compensation] payments". Stockford, supra at 845.

In Sun Ship, Inc. v. Pennsylvania, supra, this Court has determined that state compensation schemes are not pre-empted by the Longshore and Harbor Workers' Compensation Act when employees are injured in locations that are within the jurisdictional reach of both state and federal law. 447 U.S.C. 715 (1980). Professor Larsen, in his Treatise on Workmen's Compensation Law, has asserted that the primary reason that the doctrine of election of remedies is inapplicable to selection of federal and state compensation remedies is that the doctrine involves a choice between inconsistent remedies, and state and federal benefits are complementary rather than inconsistent. Larson, Workmen's Compensation Law, §89.74. One of the expressed purposes of the Sun Ship case was to give effect to congressional intent, as reflected in the 1972

Amendments to the Longshoremen's and Harbor Workers' Compensation Act, to eliminate the disparities in compensation available to maritime workers, which in the past were dependent upon whether injuries occurred on land or on water.

Although the holding in Sun Ship allows an injured maritime worker to maximize his recovery by entitling him to the most benefits allowable under either state or federal system, the Sun Ship Court made it clear that an employee is to be prevented from receiving a double recovery of compensation benefits. Sun Ship, Inc. v. Pennsylvania, supra, footnote 8. Payments received by an employee under one system of benefits must be credited to the employer who has subsequently been ordered to pay benefits under the other system. Calbeck v. Travelers Insurance Company, 370 U.S. 114 (1962). See also Stockford v. Bath Iron

Works Corp., 482 A.2d 843, 845 (Me. 1984). The amount of credit to which an employer is entitled is based upon the level of benefits actually received by the employee. Landry v. Carlson Moring Services, 643 F.2d 1080 (5th Cir. 1981), cert. denied, 454 U.S. 1123 (1981).

The United States Congress codified the holding of Sun Ship, supra, and Landry, supra, in 1984 when it amended §903 of the Longshore and Harbor Workers' Compensation Act to add subsection (e) which provides that "[n]otwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this chapter." 33 U.S.C. §903(e). That amendment leaves no doubt that Congress intends employers to

have the benefit of a credit for any state imposed compensation obligation against federally imposed liability.

The language of this Court in Sun Ship makes plain that although Congress and the Court was unconcerned about states providing an employee with superior benefits, the doctrine of concurrent jurisdiction should not operate to allow employees who are fortuitously injured within the narrow area of maritime/land based employment to recover combined benefits without any setoff. Such a windfall would undermine the analytical foundation of the doctrine of concurrent jurisdiction, and would call into question this Court's past rulings on the issue of whether the Federal Act should be construed to pre-empt the field. The holding of the Maine Supreme Judicial Court produces such a windfall and ought not to be allowed to

stand as a guide to future Courts considering the proper relationship of recovery under the Longshore and Harbor Workers' Compensation Act and State Compensation Acts. The decision of the Court below undermines the federal interests in uniformity and transforms what should be a simple administrative procedure into a potential flood of litigation. Virtually all shipyard workers are within the jurisdictional reach of state and federal workers' compensation laws, and it is respectfully suggested that this Court ought not allow the holding of the Maine Court below to stand as a guide for future courts. There is a need for this Court to state the proper interpretation of federal law, thus insuring uniformity and fairness in future cases.

II. BOTH CASE LAW AND PUBLIC POLICY REQUIRE THAT AN EMPLOYER BE ALLOWED, AS A MATTER OF LAW, A FULL CREDIT FOR ALL BENEFITS PAID TO AN EMPLOYEE UNDER THE

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AGAINST A SUBSEQUENT STATE WORKERS' COMPENSATION OBLIGATION.

In the context of the well established doctrine of concurrent jurisdiction, the public policy interests of the State Workers' Compensation Commission is simply in ensuring that its workers receive the full level of benefits to which they are entitled under the State of Maine Workers' Compensation Act. Similarly, the Federal Administrative Law Judges further the intent of Congress and their public policy objectives by simply ordering payment of all benefits which the employee is due under the federal benefit scheme. By ordering benefits to the full level of each respective entitlement, subject to a credit for payments made for the same injury under the companion act, both state and federal entities will be

achieving their public policy objectives. Neither jurisdictional entity has any legitimate interest in construing the doctrine of concurrent jurisdiction in such a manner as to produce benefits to an employee beyond those that are available under their respective compensation scheme. Compensation awards that allow haphazard bonanzas or windfalls to some employees based upon the vagaries of comparative statutory analysis further no legitimate public policy interest and will result in a flood of creative litigation.

In its attempt to insure that the employee in this case received all benefits to which he was entitled under Maine law, the Court below went beyond its own legitimate policy interests and attempted to interpret the meaning or intent of the statutory provisions of the Longshore and Harbor Workers'

Compensation Act, with which the State Court is neither involved nor familiar. Under the rubic of a comparative benefit analysis, the State Court ignored the federal requirement of a setoff of all benefits paid for the same injury, which is a necessary prerequisite in order to avoid the doctrine of federal pre-emption and the doctrine of election of remedies. Moreover, the result of the analysis of the Maine Supreme Court is that Mr. Bouford will receive benefits greater than those to which he would be entitled under either the Federal Longshore and Harbor Workers' Compensation Act or the State of Maine Workers' Compensation Act.

It is noteworthy that the dissent from the opinion of the Court below was authored by the same Justice who authored the majority opinion in Stockford v. Bath Iron Works, 482 A.2d 843 (Me. 1984). In

Stockford, the Maine Supreme Judicial Court held that Stockford could not obtain a double recovery. In the dissent from the opinion of the Court below, this Justice wrote that that ruling was based upon a "controlling prinicple of federal law announced in footnote 8 of Sun Ship". (Appendix p. 20(a)). Justice Roberts observed in his dissent that the principle of federal law that requires that all payments under the Longshore Act be credited against superior state benefits was an integral part of the development of the doctrine of concurrent jurisdiction through Davis v. Department of Labor, 317 U.S. 429 (1942), Calbeck v. Travelers Insurance Company, 370 U.S. 114 (1962), and Sun Ship v. Pennsylvania, supra. It is clear that both the Supreme Court's language in footnote 8 of the Sun Ship case as well as the subsequent enactment of 33 U.S.C. §903(c) requires

that any amount paid for permanent impairment under the Maine Workers' Compensation Act be credited toward federal liability for the same injury. As the dissent points out:

> It is inconceivable that the application of the setoff principle is dependent upon the fortuity of whether the state or federal proceeding occurred first. (Appendix pp. 21a-22a).

If the decision of the Court below is allowed to stand, it will foster forum shopping and will provide employees who litigate their federal claims first with greater benefits than those employees who are similarly injured and similarly disabled but who litigate their state claims first. Such disparities further no state or federal interest and threaten the very foundation of the doctrine of concurrent jurisdiction. These are the

very consequences this Court sought to avoid in Davis, supra, Calbeck, supra, and Sun Ship.

Finally, it must be noted that the comparative analysis utilitized by the Maine Supreme Judicial Court is flawed. The permanent partial disability benefit paid to the employee under the Federal Longshore and Harbor Workers' Compensation Act is an integral part of the so-called "scheduled award" provisions of that Act. See 33 U.S.C. §908(c). (Appendix G, pp. 96a-100a). Section 908(c) provides for payment of permanent partial disability as follows:

> (c) Permanent Partial Disability. In cases of disabilty, partial in character but permanent in quality, the compensation shall be 66 2/3% of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (c) of this section respectfully, and shall

> be paid to the employee as follows: . . . " (emphasis added)

Subsections 1 through 17 deal with specific scheduled awards for arms, legs, hands, feet, eyes, etc. Subdivisions 21, under which Mr. Bouford was compensated, deals with:

> (21) Other cases: In all other cases in this class of disability, the compensation shall be 66 2/3 of the difference between his average weekly wages and his earning capacity thereafter in the same employment or otherwise . . . "

The payment for permanent partial disability ordered by the Administrative Law Judge was a payment that was ordered in addition to whatever temporary total or temporary partial disability may occur from time to time for Mr. Bouford. It was an integral part of the scheduled provisions of the Longshore and Harbor Workers' Compensation Act. The express language of the Decision and Order of the

Administrative Law Judge indicated that he relied upon the medical evidence to the effect that the employee had reached a point of "[m]aximum improvement and that the employee had sustained 'permanent impairment at 25% loss as it relates to the whole man or 50% loss of the back'" to ultimately conclude that the employee was entitled under the provisions of 33 U.S.C. §908(c)(21) to benefits for continuing permanent partial disability. The award was made under that statutory provision because it involved the back and there was no specific scheduled remedy provided. Although this benefit was not divorced from the concept of actual wage loss, it definitely included consideration of permanent loss of use and function of the back.

This illustrates two points. First, the Court below was wrong as a matter of law when it concluded that there was no provision in the Longshore and Harbor Workers' Compensation Act for payment for permanent loss of use of the back. Second, the federal scheme with respect to payments for loss of use and function to any bodily members is radically different in kind from the State Workers' Compensation scheme. It is suggested that it is impossible to draw analogies between specific federal benefits paid and specific state entitlements because the statutory schemes are so different. The protection of state and federal interests respectively can be accomplished by a rule of law that simply orders payment of all benefits to which the employee is entitled under each system with an allowance for a credit in favor of the employer for benefits paid

to the employee under the other system. This insures that the employee is entitled to the best of both worlds, but protects the employer from the obligation to pay double benefits or windfall benefits based on the fortuities of so-called comparative benefits analysis or the timing of the choice of forums.

CONCLUSION

Wherefore, the Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Maine Supreme Judicial Court in Bouford v. Bath Iron Works Corporation, et al. The decision of that Court undermines the very foundation of the federal doctrine of concurrent jurisdiction. Rather than ensuring entitlement to maximum state benefits, it goes far beyond what is needed to accomplish that goal at the price of uniformity and fairness.

Respectfully submitted,
NORMAN, HANSON & DeTROY

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CERTIFICATE OF SERVICE

AND FILING BY MAIL PURSUANT

TO RULE 28.2 and RULE 28.5

I, James D. Poliquin, Esq., certify that I have personal knowledge that on November 22, 1986 I caused to be mailed, postage prepaid, by depositing in a United States Post Office, forty (40) copies of the Petitioners Bath Iron Works Corporation's and Commercial Union Insurance Company's Petition for a Writ of Certiorari to the Maine Supreme Judicial Court in the case of:

BATH IRON WORKS CORPORATION

and

COMMERCIAL UNION COMPANY,

Petitioners

v.

BRUCE E. BOUFORD,

Respondent

to the Clerk of the Supreme Court of the United States, One First Street N.E., Washington, D.C. 20543, and mailed by the same method three (3) copies to Donald Fontaine, Esq., 7 Dana Street, P.O. Box 7102 DTS, Portland, Maine 04112, Counsel for Bruce E. Bouford.

James D. Poliquin, Esq.
Member, Bar of United
States Supreme Court
Counsel of Record
NORMAN, HANSON & DeTROY
415 Congress Street
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Portland, Maine 04112

STATE OF MAINE
CUMBERLAND, SS.

Personally appeared the above-named James D. Poliquin, who subscribed and swore to this instrument this 22nd day of November, 1986.

Before me,

Notary Public

REBECCA D'ALESSIO
NOTARY PUBLIC, MAINE
MY COMMISSION EXPIRES NOVEMBER 4, 1993

APPENDICES

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APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 4222
Law Docket No. WCC-86-27

BRUCE E. BOUFORD

v.

BATH IRON WORKS CORP., et al.

COMMERCIAL UNION INSURANCE CO.
(Insurer)

Argued June 6, 1986
Decided August 27, 1986

Before McKUSICK, C.J., and NICHOLS, ROBERTS, GLASSMAN, and SCOLNIK, JJ., and VIOLETTE, A.R.J.* SCOLNIK, J.

Bath Iron Works Corporation (BIW) and the Commercial Union Insurance Company appeal from a decision of the

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*VIOLETTE, A.R.J., sat at oral argument as Associate Justice, but retired prior to the preparation of this opinion. He has joined in the opinion as an Active Retired Justice.

Appellate Division of the Workers' Compensation Commission affirming the commissioner's decision ordering, inter alia, BIW to pay Bruce Bouford benefits For fifty percent permanent impairment for loss of use of his back. BIW contends that the commissioner erred in ruling that it was not entitled to credit against the permanent impairment award federal compensation benefits paid to Bouford. We affirm the decision.

The facts are undisputed. Bouford sustained an injury to his lower back and legs arising out of and in the course of his employment by BIW on August 16, 1978. As a result of that injury, Bouford received benefits voluntarily under the federal Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 (1986). Specifically, he

received benefits for temporary total disability from August 18, 1978 to February 4, 1980, and for permanent partial disability thereafter. Because BIW hired Bourford after he had suffered a back-related injury in 1975, its liability for Bouford's second job-related injury was limited to two years. As a result, after February 4, 1982, Bouford's permanent partial disability benefits have been paid out of a special fund established pursuant to 33 U.S.C. §§ 908(f), 944.

On January 30, 1984, based on the 1978 injury, Bouford filed two petitions under Maine's Workers' Compensation Act (WCA), 39 M.R.S.A. §§ 1-195 (1980 & Supp. 1985-1986), one for an award of compensation, the other for a determination of the extent of permanent

impairment. The commissioner granted both petitions. He found Bouford to have been totally incapacitated from August 18, 1978, to March 19, 1979, and twenty-five percent partially incapacitated for an open-ended period beginning March 19, 1979. BIW was further ordered to pay Bouford fifty percent permanent impairment for the loss of the use of his back, a lump sum in the amount of $16,053. Since Bouford had received benefits under the LHWCA for the 1978 injury, the commissioner allowed BIW to credit the federal compensation benefits paid during the specified periods against the Maine compensation awards. However, he did not extend this offset to the permanent impairment award because the LHWCA did not contain a similar provision compensating Bouford for the loss of the

use of his back. After the Appellate Division affirmed the commissioner's decision, we granted BIW's petition for review.

The LHWCA is a federal workers' compensation statute designed in part to provide compensation for injuries sustained by persons engaged in maritime employment. See 33 U.S.C. § 902 (3). The Act, however, does not prevent a state from applying its workers' compensation scheme to land-based injuries that are also covered by the LHWCA. In Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980), the United States Supreme Court declared that concurrent jurisdiction for federal and state compensation acts was consistent with ensuring that any award a marine worker receives meets the minimum

benefits under the LHWCA regardless of whether he was injured on land or over water. The Court stated:

> (I)f state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and superior state benefits.

Id. at 724 (emphasis in original) (footnote omitted). To be sure, under concurrent jurisdiction, an employee is prevented from receiving a double recovery of compensation benefits. ID. at 725 n.8. See also Stockford v. Bath Iron Works Corp., 482 A.2d 843, 845 (Me. 1984). BIW argues that any award under the Maine Act necessarily constitutes a double recovery if it is paid for the same injury. We disagree. An

examination of the LHWCA and Maine's Act makes clear that the permanent impairment benefits awarded to Bouford in this case are separate and distinct from the benefits he received under the LHWCA.

Bouford received benefits for permanent partial disability as a result of his 1978 injury under the LHWCA. 33 U.S.C. § 908 (c). BIW contends that this award is the equivalent of an award for permanent impairment under WCA and therefore it should be entitled to a cvredit. This contention is without merit. Subsection c of section 908 provides:

> In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disabilty or temporary partial disability paid in

> accordance with subsection (b) or subsection (e) of this section . . .

33 U.S.C. § 908 (c).[1]

Subsection (c) includes a schedule for twenty different specific injuries, primarily loss of body members. An employee who suffers an injury listed on the schedule is entitled to a fixed award regardless of the injury's effect on his

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[1]In addition to an award for permanent partial disability, the LHWCA provides for awards for permanent total, temporary total, and temporary partial disability. The remedies for permanent and temporary total disability are essentially two-thirds of the employee's average weekly wages. See 33 U.S.C. § 908 (a), (b). The remedy for temporary partial disability is two-thirds of the difference between the employee's preinjury average weekly wages and his post injury wage-earning capacity during the period of his disability, up to a maximum of five years. 33 U.S.C.A. § 908 (e). See generally Potomac Elec. Power Co. v. Director Office of Workers' Compensation Programs, 449 U.S. 268 (1980).

earning capacity. See 33 U.S.C. § 908 (c) (1) - (20). An additional subparagraph, 33 U.S.C. § 908 (c)(21), applies to all injuries not scheduled. Because a back injury is not scheduled, Bouford's permanent partial disability benefits were paid pursuant to subparagraph (21), which provides:

> Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

Unlike the scheduled provisions, permanent partial disability payments under subparagraph 21 are designed to compensate an employee for his economic loss owing to his injury. Benefits are based on actual loss of earning capacity,

and are measured by the actual impairment of the employee's wage-earning capacity caused by his injury. As the Court explained in Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 282-83 (1980):

> Unless an injury results in a scheduled disability, the employee's compensation is dependent upon proving a loss of wage-earning capacity; in contrast, even though a scheduled injury may have no actual effect on an employee's capacity to perform a particular job or to maintain a prior level of income, compensation in the schedule amount must be paid.

Maine's Act is similar to the LHWCA in that it identifies several categories of disability and separately prescribes a method of compensation for each. It provides compensation for total incapacity, 39 M.R.S.A. § 54; partial

incapacity, 39 M.R.S.A. § 55; and permanent impairment, 39 M.R.S.A. §§ 56, 56-A. Section 56, like 33 U.S.C. § 908 (c) (1-20), contains a schedule of specific injuries, primarily loss of body members or other incurable conditions, for which a specific amount of compensation is paid to an employee. These payments are also made regardless of loss of earning capacity. For injuries not scheduled, such as Bouford's 1978 back injury, section 56-A provides:

> In addition to the benefits provided for in sections 54 and 55, when an employee sustains an injury which is included in the following schedule, the incapacity in each case shall be deemed to be total for the period specified and the injured employee shall receive a lump sum payment for said injury, which shall be determined by multiplying the amount to which he would be entitled weekly for total incapacity as determined under section 54 by the period of presumed total incapacity set

> forth in this section. The specific periods of presumed total incapacity because of injuries specified in this section shall be as follows:
>
> Total loss of function of
>
> . . .
>
> Back: 200 weeks
>
> . . .

3 a M.R.S.A. § 56-A (emphasis added).[2]

Unlike the permanent partial disability benefits Bouford received under the LHWCA intended to compensate him for his loss of earning capacity, permanent impairment benefits awarded pursuant to section 56-A are based exclusively on loss of function of a bodily part. See, e.g., Campbell v. Bates Fabrics, Inc., 422 A.2d 1014, 1015 (Me. 1980) (permanent impairment benefits

---

[2]This version of section 56-A was repealed and replaced by P.L. 1985, ch. 372, § A, 21 (effective June 30, 1985).

"are not dependent upon wage loss but are paid even though the employee may have sustained no actual diminution in wages"). The state remedy has no relationship to loss of earning capacity. "Impairment benefits are justified because of losses an impaired worker experiences that are unrelated to lost remuneration. The impairment may, for example, have lifetime effects on the personality and normal activities of the worker." Id. at 1016 (quoting Report of the National Commission on State Workmen's Compensation Laws 69 (1972)). Since the permanent impairment award in this case provides compensation for the physical consequences of a work-related injury, it is not duplicative of a permanent impairment partial disability awarded to Bouford under LHWCA. Instead,

it is a superior benefit that is distinct from those available under the LHWCA. Accordingly, we find no basis to conclude that Bouford received a double recovery in this case. Absent an award under the LHWCA compensating Bouford for the permanent loss of function of his back, BIW is not entitled to an offset against the permanent impairment award.

We reject BIW's contention that public policy nevertheless requires that there be an offset in this case. We are mindful of the fact that Congress has amended the LHWCA to require that "amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law...shall be credited against any liability imposed by this

chapter." 33 U.S.C. § 903(e) (applicable to claims pending and filed after Sept. 28, 1984). That Congress requires that an employer be given credit for any payments made under a state act does not require that any payments made under the LHWCA be necessarily offset when benefits are paid under Maine's Act. Under concurrent jurisdiction, states are free to provide for more favorable benefits. When those superior benefits provide compensation that is separate and distinct from the compensation awarded under the federal act, we find no public policy supporting an offset. Since the permanent impairment award in this case is intended solely to compensate an injured employee for a physical loss of bodily function, it would defeat the purpose of that award if it were offset

against benefits paid for loss of earning capacity. In short, public policy does not support BIW's contention that Bouford's permanent impairment award be offset against his award for permanent partial disability under the LHWCA. Accordingly, we affirm the commissioner's decision denying BIW the offset.

The entry is:

> Decision of the Appellate Division of the Workers' Copmensation Commission affirmed.
>
> It is further ordered that the employer pay to the employee an allowance for counsel fees in the amount of $550, together with his reasonable out-of-pocket expenses for this appeal.

Nichols, Violette, and Glassman, JJ., concurring.

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ROBERTS, J., with whom McKUSICK, C.J., joins, dissenting.

I must respectfully disagree with the Court because I believe the Court addresses incorrectly the issue before it. If the issue were limited to a question of state law as the Court's opinion implies, I would join that opinion. I agree that permanent impairment benefits awarded Bouford "are separate and distinct from the benefits he received under LHWCA." Slip Op. at 3. Notwithstanding any converse implication of section 62, there is no explicit statutory requirement in the Maine Workers' Compensation act that BIW receive credit for the LHWCA payments. Moreover, I do not suggest adding an equitable gloss to the Maine act by requiring such a credit as a matter of

public policy. Hird v. Bath Iron Works Corp., A.2d (Me. 1986) (Decision No. 4195); Wentzell v. Timberlands, Inc., 412 A.2d 1213 (Me. 1980). I conclude, therefore, that there is no basis in our state law to require a setoff.

In my view, however, the question is one of federal law and requires that we discern what the Supreme Court would decide on the issue before us.

As our Court observes, Slip Op. at 3, the Supreme Court has determined that state compensation schemes are not preempted by the LHWCA in areas of apparent concurrent jurisdiction. Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980). Critical to that determination was the observation that the employer will receive credit on either scheme for any amounts paid under the other. Id. at

725 n.8. Our observation in Stockford v. Bath Iron Works Corp., 482 A.2d 843, 845 (Me. 1984), that Stockford could not obtain a double recovery was not intended as a statement of Maine law. Rather, we noted the controlling principle of federal law announced in footnote 8 of Sun Ship.

Although it is true that the Supreme Court observed in Sun Ship that Congress was unconcerned about states providing superior benefits, the federal scheme plainly requires all payments under LHWCA to be credited toward those superior state benefits. The opinion in Sun Ship traced the development of concurrent jurisdiction through Davis v. Department of Labor, 317 U.S. 249 (1942), and Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962). Although not part of

the dispute in Calbeck, the Supreme Court there noted that full credit was allowed in the federal proceedings for all payments made under the Louisiana Compensation Act regardless of their purpose. Footnote 8 in Sun Ship cites Calbeck as demonstrating that there is no danger of double recovery because "employer's awards under one compensation scheme would be credited against any recovery under the second scheme." The Supreme Court's language in footnote 8, as well as the subsequent enactment of 33 U.S.C. § 903 (c), would require any amount paid for permanent impairment under the Maine Workers' Comepnsation Act to be credited toward federal liability for the same injury. It is inconceivable that the application of the setoff principle is dependent upon the fortuity

of whether the state or federal proceeding occurred first. I am convinced that the Supreme Court would require LHWCA payments to be credited against an award for permanent impairment as well as any other compensation awarded for the same injury.

Finally, I reject our Court's suggestion that the offset at issue would defeat the purpose of the award for permanent impairment. Slip Op. at 8. On the contrary, regardless where the employee first seeks an award of benefits he is entitled to the maximum amount allowed to an individual under either scheme. Today's decision, however, would permit the person whose injury fortuitously is within the area of concurrent jurisdiction to obtain greater benefits than either the person suffering

a strictly land-based injury or the person suffering a strictly maritime injury. I would hold that as a matter of federal law BIW must be credited with all payments under LHWCA toward any benefits awarded under the Maine Workers' Compensation Act.

APPENDIX B

STATE OF MAINE
WORKERS' COMPENSATION COMMISSION

APPELLATE DIVISION
DECISION No. 86-01

BRUCE E. BOUFORD
(Appellee - Employee)

v.

BATH IRON WORKS CORP.
(Appellant - Employer)

and

COMMERCIAL UNION INSURANCE CO.
(Insurer)

Argued: October 10, 1985
Decided: January 6, 1986

BEFORE: Commissioners Clapp and Michaud
BY: The Commissioners

The employer appeals from a Commission decision ordering it to pay the employee compensation for total incapacity from August 18, 1978 to March 18, 1979 and 25% partial incapacity for an open-ended period beginning March 19,

1979. The employer was further ordered to pay the employee 50% permanent impairment for loss of use to his back.

We deny the employer's appeal.

Bruce Bouford sustained an injury to his lower back and legs on August 16, 1978 while employed as a machinist by Bath Iron Works Corp. As a result of this injury the employee received compensation benefits pursuant to the federal Longshoremen's and Harbor Worker's Act.[1] On January 30, 1984 the employee filed a petition for award of comensation and a petition to determine the extent of permanent impairment with the Maine Workers' Compensation Commission. In granting these petitions, as noted above, the Commission stated that the employer was entitled to a

---

[1]See, 33 U.S.C §901 et. seq

credit for the federal compensation benefits paid to the employee during the specified time periods. This offset, however, did not extend to the 50% permanent impairment award ordered under the State Act. The Commission refused to order such an offset because the Longshoremen's Act did not have a parallel provision to the Maine permanent impairment benefits.

The employer now seeks appellate review of ths single aspect of the Commission's decision.

It is well established that an employee is prevented from receiving a double recovery of compensation benefits. Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 725 (1980). The courts, however, have noted that "if state remedial schemes are more generous than federal

laws, concurrent jursidiction could result in more favorable awards for workers' injuries than under and exclusively federal compensation system." Id., at 724. Such a favorable award occurred in the case before us. Mr. Bouford is entitled to an award for permanent impairment under the Maine Act. All other things being equal, an employee who was injured and either sought compensation only under the Longshoremen's Act, or alternatively, lived in a state which did not provide for permanent impairment benefits, would receive less favorable treatment than Mr. Bouford did in this case. This was anticipated by the respective legislatures, however, and does not offend the beneficient purposes of the Act.

In this case the employee received benefits for "permanent partial disability" under the Longshoremen's Act. The employer contends that this is the equivalent of an award for permanent impairment under the Maine Act. We disagree. As pointed out by the appellant itself, the two compensation schemes are "radically different." The employee's permanent partial disability benefits were admittedly paid pursuant to 33 U.S.C.A. §908 (c) (21). Benefits paid under this particular section are "payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest." Id. (emphasis added)

The permanent partial disability payments under section 908 (c) (21) of the federal act are dependent upon loss of earning capacity. Bath Iron Works Corp. v. White, 584 F.2d 569, 575 (1st Cir. 1978). This is not true of permanent impairment awards under the Maine Act. The Maine permanent impairment benefits are exclusively based upon loss of function of a bodily part. Campbell v. Bates Fabrics, Inc., 442 A.2d 1014, 1015 (Me. 1980). Furthermore, unlike the federal benefits at issue here, Maine permanent impairment benefits are not subject to reconsideration of the degree of impairment. The loss of function of the bodily part is assessed only upon reaching a stage of maximum medical improvement and are absolute once they are assessed. 39 M.R.S.A. §56.

The distinction between the benefits paid pursuant to section 908 (c) (21) of the Longshoremen's Act and all other sections was recognized by the United States Supreme Court in Potomac Electric Power Co., v. Director, OWCP, 449 U.S. 268 (1980). The Court remarked as follows:

> Under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 44 Stat. (part 2) 41424, as amended, 33 U.S.C. §§901-950 (1976 ed. and Supp. III), compensation for a permanent partial disability must be determined in one of two ways. First, if the injury is of a kind specifically identified in the schedule set forth in §§8 (c) (1)-(20) of the Act, 33 U.S.C. §§908 (c) (1)-(20), the injured employee is entitled to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired. Second, in all other cases, §§ (c) (21), 33. U.S.C. §908 (c) (21), authorizes compensation equal to two-thirds of the difference between the

> employee's preinjury average weekly wages and his postinjury wage-earning capacity, during the period of his disability. The question in this case is whether a permanently partially disabled employee, entitled to compensation under the statutory schedule, may elect to receive a larger recovery under §8 (c) (21) measured by the actual impairment of wage-earning capacity caused by his injury. 449 U.S. at 269-270 (emphasis added)

The Court throughout the decision refers to §908 (c) (21) as "compensation for loss of wage-earning capacity". 449 U.S. at 277. This is reiterated in the Court's statement that "(b)ecause this case was decided under §908 (c) (21), rather than the schedule, it was not necessary for the administrative law judge to determine the precise extent of respondent Cross' (the injured employee's) disability." 449 U.S. at 272 n.4.

The employee has not yet been compensated for the permanent loss of function to his back. This was done upon the award of 50% permanent impairment pursuant to section 56 of the Maine Act. Absent a former award of compensation for the same reason (i.e., loss of function) the Commissioner properly refused to order an offset against the permanent impairment award.

The entry is:

Appeal denied.

Decision affirmed.

It is further ordered that the employer pay to the employee $550.00 for hs counsel fees plus his

reasonable out of pocket expenses for this appeal.

APPENDIX C

State of Maine
Workers' Compensation Commission
377 Main Street
Lewiston, Maine 04240

Donald Fontaine, Esq.
Sunenblick, Fontaine & Reben
97A Exchange Street
Portland, ME 04112

John Wallach, Esq.
Norman & Hanson
415 Congress Street
Portland, ME 04112

Re: WCC#: L48244

This decision may be appealed to the Appellate Division of the Workers' Compensation Commission, State House Station 27, Augusta, Maine 04333 within 20 days after receipt of notice of filing. See 39 M.R.S.A. § 103-B.

****

BRUCE E. BOUFORD
(Employee)

v.

BATH IRON WORKS CORP.
(Employer)

and

COMMERCIAL UNION INSURANCE CO.
(Insurer)

Findings of Fact and Conclusions of Law

Commercial Union Insurance Co. has filed a Motion for Findings of Fact and Conclusions of Law in connection with the Commission decision of December 12, 1984. The Commission decision granted the employee's Petition for Award and Petition to Determine the Extent of Permanent Impairmen. The focus of the employer's request for findings of fact and conclusions of law is basically to clarify the order.

The decision found the employee 25% partially incapacitated from March 19, 1979 to the present and continuing. This specific finding of partial incapacity was awarded with knowledge that the employee has been receiving Federal workers' comensation at a roughly

equivalent rate and time period. In regard to this award for partial incapacity, the Commission concludes there is an offset permissible by Commercial Union for prior Federal workers' compensation benefits paid for weekly incapacity.

In fact, for a significant period of time, Mr. Bouford's benefits under the Longshoreman's and Harborworkers' Act have been paid by a Federal fund of some type, and not by Commercial Union.

In regard to the award of 50% permanent impairment to the employee's back due to the injury of August 16, 1978, there is no offset because Federal workers' compensation laws do not provide for such a benefit. The order will be revised to reflect these conclusions.

THEREFORE, Commercial Union is ordered to pay the employee total weekly incapacity from August 18, 1978 to March 18, 1979, at a rate of $160.53; and 25% partial incapacity from March 19, 1979 to the present and continuing, at a rate of $40.13, plus adjustments for inflation. Commercial Union is entitled to a credit for weekly Federal compensation benefits paid for weekly incapacity since March 19, 1979.

Commercial Union is also ordered to pay the employee 50% permanent impairment for the loss of use to his back in the amount of $16,053.00. Since there is no such benefit paid under the Federal Longshoremen and Harborworkers' Act, Commercial Union is not entitled to any credit against the employee's permanent impairment award.

So Ordered.

Lewiston, Maine

Dated: 4/9/85

WORKERS' COMP. COMM.

/S/

Ralph L. Tucker
Commissioner

APPENDIX D

State of Maine
Workers' Compensation Commission
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Lewiston, Maine 04240

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Portland, ME 04112

John Wallach, Esq.
Norman & Hanson
415 Congress Street
Portland, ME 04112

Re: WCC#: L48244

This decision may be appealed to the Appellate Division of the Workers' Compensation Commission, State House Station 27, Augusta, Maine 04333 within 20 days after receipt of notice of filing. See 39 M.R.S.A. § 103-B.

****

BRUCE E. BOUFORD
(Employee)

v.

BATH IRON WORKS CORP.
(Employer)

and

COMMERCIAL UNION INSURANCE CO.
(Insurer)

On January 30, 1984, Bruce E. Bouford filed a Petition for Award and a Petition to Determine the Extent of Permanent Impairment; both petitions were filed in connection with the injury of August 16, 1978, while employed by Bath Iron Works.

The employee has received workers' compensation pursuant to the Longshoremen and Harbor Workers' Act which provides overlapping compensation coverage for those engaged in ship building. Mr. Bouford now brings a claim under the Maine Workers' Compensation Act, seeking two items. First, he seeks an award under the State system of 50% partial incapacity rather than 25% partial incapacity as determined by the Department of Labor. Secondly, the

employee seeks permanent impairment due to loss of use to his back, a type of benefit which is not available under the Longshoremen and Harbor Workers' Act.

Findings of Fact

1. Bruce E. Bouford is a 49 year old machinist who has been employed at Bath Iron Works for a number of years.

2. On August 16, 1978, the employee injured his low back. His average weekly wage at the time was $240.80.

3. The employee was totally incapacitated from August 18, 1978 to March 18, 1979. The employee returned to work, but with physical limitations, on March 19, 1979.

4. The employee has been 25% partially incapacitated from March 19, 1979 to the present and continuing. Before proceedings in this claim could be

completed, the employee apparently has not worked since September 13, 1984. No factual finding is made on the issue of whether the employee may or may not be entitled to total weekly compensation commencing September 13, 1984. This issue is reserved for a later proceeding if the parties are not able to come to a voluntary agreement based on the medical evidence available. To avoid further delay, however, this decision is issued at this time awarding 25% from March 19, 1979 to the present and continuing. Any specific claim for a new period of total incapacity is specifically reserved.

5. The employee has 50% permanent impairment to this back due to the injury of August 16, 1978. This finding is based on the medical opinion of Dr. Victor Parisien.

Conclusion of Law

The Commission concludes the employee is entitled to coverage pursuant to the Maine Workers' Compensation Act. He has filed his claim within two years of last payments made by Bath Iron Works, and his medical bills have continued to be paid by Bath Iron Works on an ongoing basis.

The employee is entitled to have his workers' compensation claim considered under the Maine laws, as well as under Federal workers' compensation laws. The employer is entitled to a credit or offset for benefits paid.

THEREFORE, the insurer is ordered to pay the employee total weekly incapacity from August 18, 1978 to March 18, 1979, at a rate of $160.53; and 25% partial incapacity from March 19, 1979 to the

present and continuing at a rate of $40.13, plus adjustments for inflation. The insurer is entitled to a credit for Federal compensation benefits paid during these weeks of incapacity. The insurer is also ordered to pay the employee 50% permanent impairment for loss of use to his back in the amount of $16,053.00.

So Ordered.

Lewiston, Maine WORKERS' COMP. COMM.

DATED: 12/12/84

/S/
Ralph L. Tucker
Commissioner

APPENDIX E

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:
	:
BRUCE E. BOUFORD,	:
Claimant	:
	:
v.	:
	:
BATH IRON WORKS,	:
Employer	:
	:
and	:
	:
COMMERCIAL UNION INSURANCE CO.,	:
Carrier	:

Case No. 80-LHCA-1369

OWCP No. 1-43962

Richard D. Hewes, Esq.
For the Claimant

Stephen Hessert, Esq.
For the Employer

Before: FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, et seq., herein-after mentioned as "the Act") and the regulations governing its administration. (20 CFR 701, et seq.)

After referral for a formal hearing on May 2, 1980, this claim was scheduled for hearing at Portland, Maine, on August 6, 1980. (33 U.S.C. 919 (d) and 20 CFR 703.331) The issues initially claimed by the parties in their respective forms LS-18 were narrowed prior to the commencement of the hearing.

Issues

The issues listed by Claimant were whether or not he sustained a work related compensable injury on August 16,

1978, whether or not he gave notice of that injury to Employer, whether disability benefits paid Claimant between August 18, 1978 and March 18, 1979 should be based on the November 20, 1975 wage level or on the August 16, 1978 wage level, whether Claimant has suffered a loss of earning capacity as a result of his industrial accidents, and whether Claimant has failed to receive promotions as a result of the injuries he sustained in these accidents.

The issues raised by Employer were given as the nature and extent of the August 16, 1978 injury, whether or not the 1978 injury and notice occurred in fact, the applicability of Section 8 (f) of the Act, and the modification of a prior award of compensation due to a change in Claimant's condition.

The party in interest was not represented at the hearing, even though notice was duly transmitted.

Also, at the time of the hearing the Employer conceded that the August 16, 1978, injury and notice had occurred, as asserted by Claimant. So this was not decided as an issue in this case.

Stipulations

The parties stipulated that they are subject to the Act; that claimant and Employer were in an employee and employer relationship; and that the injury of August 16, 1978, arose out of and within the scope of that employment. They further agreed that Employer had timely notice of the injury and that Claimant's request for compensation was timely. Employer conceded that it had not filed either a notice of controversion or a

first report of accident in this case. The parties agreed that on August 16, 1978, Claimant's weekly wage rate was $240.80, with a compensation rate of $160.53 at that time. They further agreed that as of November and December 1975, the dates when certain earlier injuries had occurred, the Claimant's wage rate was $166.80, with a compensation rate of $111.20. Following the August 16, 1978 accident, the Employer paid Claimant temporary total disability from August 18, 1978 through March 18, 1979, a period of 30.37 weeks, at the rate of $111.20 per week, for a total sum of $3,383.66. This payment was based on the 1975 weekly wage level. Although the last payment was made on March 18, 1979, the notice that compensation payments were being stopped

(Form 208) was dated and/or filed on July 2, 1979. The parties agreed that Employer has paid for such medical services as are compensable under 33 U.S.C. 907, and that claimant suffered a temporary total disability between August 18, 1978 and March 18, 1979, returning to work in his regular employment with Employer on March 19, 1979.

Claimant and His Employment History

Claimant was born August 11, 1934, and was forty-six at the time of the formal hearing. He is married and claims his wife as a dependent. He ended his academic education on graduating high school. He has had further vocational training as a machine operator and in maintenance and repair of machines. During his career he has been a mover of heavy duty equipment, and of furniture

for home and office. He has been a truck driver, and he has repaired and set up machinery.

Claimant started work with Employer as a pipefitter, beginning its school for pipefitting on March 17, 1975. He worked as a pipefitter for one year, when he was assigned to work as an outside machinist, the job for which he had first applied. This has been his assignment since that date. (Tr., pp. 110-112, 117-118).

The Injury

Claimant had formerly suffered job-related injuries in 1975 while working for Employer. On August 16, 1978, the Claimant was in the process of maneuvering a heavy piece of pumping equipment when it unexpectedly shifted position at his workbench. As a result of his effort to avoid being struck, the

Claimant pushed himself backward. He fell against and over a pallet box behind him. (Tr., pp. 28-30). Claimant's back was injured when he suffered the impact of this fall against various articles at and about this workplace. This exacerbated the effects of the earlier injuries to that part of his body. He later returned to work after medical treatment; but he still suffers from the sequellae of this mishap. (Tr., pp. 30-33).

His capacity to perform his normal duties varies. He can still perform between three and eight hours of work per shift, depending on how he feels on a given day. He takes medication for pain; he feels hampered in his work by the limitation imposed by the injury; and he says he does less work and is slower at

his job than the other employees in the same position who work alongside him. (Id.) By reason of this disability the Claimant has contended that he failed to achieve an appropriate rate of progress from third class to second class mechanic on this job. (Tr., pp. 33-37). This was disputed by the Employer. (Tr. pp. 82-89, 96-98, 105-107, 120-122).

The injury resulting from this episode was the herniation of 5-1 lumbar disc. As a consequence, Claimant underwent excision of the 5-1 lumbar disc, laminectomy of L5 on the left, and foraminotomy of the L5 nerve root left. The surgeon observed that the cause of the compression was a posteriorly bulging disc and compression of the nerve root between the disc and the facet.

He has been found to have a 25% permanent partial disability as to the "whole man" and 50% permanent partial disability to the back. (Emp. Ex. 29) This result has been duly connected up with the August 16, 1978 job-related accident.

Claimant's Entitlement to Compensation Benefits

By way of a response and to lend perspective and support to its claim for relief under 33 U.S.C. 908 (f), the Employer offered substantial evidence as to Claimant's pre-existing condition. By x-ray examination the Claimant was found in 1976 to have congential scoliosis (thoracic) and a spina bifida occulta at vertebra L-5. (Emp. Ex. 22) In 1972 the Claimant had suffered a whiplash injury to some portion of his spine,of which

Employer did not learn until January 5, 1976. (Emp. Ex. 15) On November 20, 1975, and on December 4, 1975, the Claimant suffered back injuries while employed by Employer. These were claimed as permanent by the Claimant. (Emp. Ex. 03, 04, 05, 06, 09, 25, 29 and 31. For detailed discussion of the 1975 injuries see Emp. Ex. 32, transcript of hearing on OWCP No. 1-21689, 77-LHCA 1230 on December 6, 1977).

At the time of the August 16, 1978 job-related injury the Claimant was receiving compensation benefits under the Act. Employer was ordered to pay Claimant temporary partial disability from May 30, 1976 and continuing until further order, but in no event to exceed a period of five years. The benefits Claimant was receiving on the date of the

1978 accident had been computed to reflect a reduction of his earning capacity as it existed on May 30, 1976, from $166.80 to $125.10 under the 1975 accident compensation award. (Emp. Ex. 33, 34) This was reflected as a partial disability equal to 25% at that time. (Emp. Ex. 34).

Based on the entire record and taking into account the description of his condition given by the Claimant and by the attending physicians, I conclude that the job-related injury of August 16, 1978, resulted in the aggravation and worsening of Claimant's pre-existing physical condition to the extent that the Claimant thereafter was permanently disabled as to his back and as to the whole person. The onset of such partial permanent disability was preceded by

various dates on which the Claimant was totally and partially disabled on a temporary basis, only.

The period of temporary total disability began on August 18, 1978, and ended at the close of March 18, 1979. He was compensated at a rate based on the 1975 average weekly wage for 30.37 weeks of temporary total disability at $111.20 per week, for a total of $3,383.66 (Tr., pp. 11-13) I find that Claimant's compensation for temporary total disability should have been computed on the basis of his average weekly earnings as of August 16, 1978, for this period.

Since his weekly rate was then $241.20 for a five day week, the correct compensation rate was $160.80. The difference should be paid, together with interest from the date when each such

payment was due and payable during the subject period. (Emp. Ex. 11) Strachan Shipping Co. v. Wedemeyer, 452 F2 1225 (C.A. 5-1971); Ryan v. McKie Co., 1 BRBS 221 (1974).

Following Claimant's return to work on August 19,1979, he could no longer be regarded as totally disabled. The extent and permanence of his disability was at that point still undetermined. (Emp. Ex. 25, 26 and 28) On February 4, 1980, however, the attending physician reported that physical examinations of Claimant continued to show limitation of back motion, that Claimant was then working at light duty in his regular employment, and that the employment required the lifting of 30 to 100 pound weights together with another worker. After having followed Claimant on a regular basis after the

operation, the physician then evaluated his permanent impairment at "25% loss as relates to the whole man or 50% loss of the back." (Emp. Ex. 29)

Maximum improvement has been reached. The patient has recurring episodes of low back pain, which seem to be related to heavy lifting on different occasions. The doctor said this vulnerability will continue in the future. He will always have some permanent impairment which relates back to the August 16, 1978, accident. (Cl. Ex. A, pp. 6-10) This was based in part on the medical history leading up to this episode. The reasoning was that even though claimant had back problems in the past, he had not suffered from radiating pain prior to August 16, 1978. (Id., pp. 13-14, 19-20) Based on the Claimant's

testimony and on the reports of the attending physicans, I find that between the date he returned to work, August 19, 1979, and February 4, 1980, and continuing thereafter the Claimant has been permanently partially disabled by the sequellae of that accident.

After reviewing the testimony of Employer's witnesses, LaBelle and Caouette, together with the testimony of the Claimant and the medical reports of Dr. Parisien, I find that the extent of the temporary partial disability that existed after August 19, 1979, was neither greater nor less than the permanent partial disability appraised as of February 4, 1980, when considered in terms of the claimant, his employement

duties, his capacity to perform those duties, and the conditions under which he worked at Employer's shipyard.

In determining the economic loss of Claimant's capacity to earn wages on the basis of this medical foundation, it has been considered that Employer has shown its awareness that Claimant must remain in light work; that it has made reasonable efforts to rehabilitate the Claimant; and that it has followed a broad pattern of assigning him to light duty work in an effort to keep him in the workforce. I find persuasive Employer's testimony that the Claimant's failure to progress to higher class ratings as a mechanic is more closely related to hs need to increase his knowledge and facility in the technical aspects of the

job than to the effects of the disability arising from his job-related injury. (Tr., pp. 82-89, 96-98, 105-107, 120-122)

On the other hand, it has also been considered that the well-established vulnerability of Claimant's back to the disabling effects of over-exertion has an explicit impact on his availability from work that is common to the trade that he has learned at great effort. For example, this Employer did not hire him during February of 1976 when a pre-employment physical noted that he could not engage in heavy lifting because of his back. (Emp. Ex. 15) Claimant's wage earning capacity is now conditional on Employer's finding the appropriate "light duty" work for him to perform. In the event of a layoff, he can expect to have a restricted market for his services in

seeking re-employment within his trade and limited physical capacity. No evidence as to alternative employment appears in this record.

For these reasons the doctor's findings of "50% loss of the back" is more significant in the case of this worker in this trade than is the "25% loss as relates to the whole man". In economic terms this supports a finding that the Claimant should be paid compensation benefits at the rate of $64.32 per week by reason of the temporary and permanent disability he suffered as result of the injury sustained on August 16, 1978. 33 U.LS.C. 908 (c) (21); Perini Corp. v. Heyde, 306 F2d 1321, (D. R.I. - 1969) and see Deviller v. National Steel and Shipbuilding Co., 10 BRBS 649 (1979)

Applicability of 33 U.S.C. 908 (f)

Employer's obligation to pay permanent partial compensation benefits to the Claimant should be limited to a period that does not exceed 104 weeks for the reasons contemplated by Congress in adopting 33 U.S.C. 908 (f).

On February 4, 1980, it became evident that because of the 1978 accident the Claimant's earning power had been diminished permanently Bath Iron Works v. Director, OWCP, 605 F2d 583 (1979). The Claimant was suffering from a pre-existing permanent partial disability that was manifest to employer no later than early 1976, when Dr. Marcotte discovered the congenital thoracic scoliosis and spina bifida occulta. This had resulted in Employer's initial refusal to hire him because it had no

light duty in which to employ his services. (Emp. Ex. 22; also see 15) Equitable Equipment Corp. v. Hardy, 558 F2d 1192, 6 BRBS 666 (3d Cir. 1977).

The evidence is that Employer then did hire Claimant to work on light duty in which he became more seriously injured than before. The degree of disability following the accident of August 16, 1978 resulted from a combination of that injury and the existing condition of partial disability. McDuffie v. Eller and Co., 10 BRBS 685 (1979); and see Mapp v. U.S. Air Force Central Welfare Fund, 12 BRBS 418, 425-426 (1980) While some uncertainty is introduced by the pendency of a five-year order for temporary partial disability at the time of the last injury, it is not necessary to rely on that award to demonstrate that

Claimant had a pre-existing partial permanent impairment of his back because the 1976 x-rays are sufficient to establish the nature of his condition at the time they were made. Employer's reliance on 8(f) was patent and appropriate in this case.

Modification of Prior Award

As mentioned above, by an order dated April 21, 1978, and by the supplemental order dated May 19, 1978, an Administrative Law Judge considered the job-related injuries that Claimant suffered on two dates in 1975, and awarded him benefits reflecting a temporary reduction in wage-earning capacity to the extent of $41.70 per week. Claimant was found entitled to

such compensation for a five year period beginning May 30, 1976, and continuing until May 29, 1981.

When he was again injured on August 16, 1978, the Employer conceded Claimant was totally disabled and made payments based on that degree of disability at the 1975 rate, as discussed above. In Employer's brief it contends that the August 16, 1978, mishap resulted in a mere change of condition and not a different injury that required a new level of compensation.

This contention is rejected for reasons already discussed in detail. In addition, it has been explained that the physical condition arising from the 1978 injury caused Claimant to suffer a loss of earning capacity that was thence forward permanent. This conclusion does

not ignore the fact that he is still paid at the same rate of hourly wages as he would be paid without the injury. The finding turns on the reduction in his avilability to accept employment in his trade, which loss has now become more serious and is permanent.

For these reasons and because the parties have in fact recognized the worsening of Claimant's condition by the change in the level of payments when he was totally disabled and not partially disabled for a limited period, I find that the previous decisioin and order should be and it hereby is vacated, effective March 18, 1978. At this time the Claimant is only entitled to compensation benefits for the August 16, 1978, job-related accident, whose effects encompassed and made worse all of the

symptoms and disabilities Claimant suffered in the job-related injuries of 1975.

Application of 33 U.S.C. 914

The Act provides at §14(d) that, if employer controverts its liability for compensation, it must file a notice of controversion with the deputy commissioner within 14 days after it has knowledge of the alleged injury. The filing of a notice of suspension of compensation payments does not necessarily constitute a filing of a notice of compensation. Garner v. Olin Corp., 11 BRBS 502 (1979).

In this case the Employer expressly stipulated that it never filed either a notice of controversion or a first report of accident. The apparent reason, as is clear in the presentation of Employer's

brief, is that the Employer did not regard the episode of August 16, 1978, as an injury within the meaning of the Act.

The inconsistency of Employer's position is found in its decision to pay compensation at the rate of 100% for total disability, beginning on August 18, 1978. This event was not a spontaneous worsening of the pre-existing disability, as it arose out of a new trauma. Consequently, Employer's position has been rejected.

The Claimant has been found to have been re-injured when he fell in the job-related accident of August 16, 1978, resulting in the exacerbation of the symptoms, conditions and sequellae of the two 1975 mishaps, for which he was then and there receiving compensation benefits for a temporary partial disability of the

same portions of the body as were described in Employer's Exh. 25 and 30 during September of 1978. For this reason the 1978 was a new injury within the meaning of the Act.

It follows that the Employer had a duty to comply with §14(d) of the Act. The fact that it had paid 100% of the compensation rate on and after August 18, 1978, did not relieve it of this responsibility, as the level of payments was based on the average rate of wages for 1975 and not for 1978, indicating that Employer was contesting the fact that a new injury had occurred. From this it follows that §14 (e) of the Act applies by reason of Employer's failure to comply with §14(d).

At §14(e) the Act provides that, if the employer fails to pay compensation voluntarily within 14 days after it becomes due, employer will be liable for additional compensation unless it files a timely notice of controversion or unless the deputy commissioner excuses the failure to pay compensaiton voluntarily within the statutory criteria. Employer failed to pay to Claimant the amount of compensation to which Claimant was entitled as benefits that represented the difference between his average rate of pay in 1975 and his average rate of pay in 1978. This differential extends from August 18, 1978 through all of the benefits that accrued after that date, including payments that have been amde at

the 1975 wage level, heretofore tendered and accepted by the Claimant within that period.

Claimant may not waive his right to additional compensation under §14(e). McNeil v. Prolerized New England Co., 11 BRBS 576 (1979). Employer's liability under §14(e) for failure to pay compensation or to file a notice of controversion is not excused because it is difficult to determine the true nature of Claimant's disability and to pay the appropriate compensation in the initial stages. Employer should have paid the compensation it considered due and controverted the remainder. Alston v. United Brands Co., 5 BRBS 600 (1977). Claimant's failure to raise this issue at the time of the hearing does not alter

Employer's obligation to make the added payments required by Congress under §14(e).

Employer's liability under §14(e) is based solely on the difference between the compensation Employer paid voluntarily and the remainder, which it failed to controvert in this case, where Claimant has been awarded compensation at a rate greater than Employer voluntarily paid. National Steel & Shipbuilding Co. v. Bonner, 600 F2d 1288 (9th Cir. 1979); Chandler v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 293 (1978) Such liability ceased to accrue on the date of the informal conference before the deputy commissioner. National Steel & Shipbuilding Co., v. U.S. Department of Labor, OWCP, 606 F2d 875, 880 (9th Cir. 1979) Evidence of the date of such a

conference does not appear in this record. For this reason it will be necessary to remand this part of the claim to the deputy commissioner for the purpose of computing the amount the Employer is obligated to pay under § 14 (e).

To the extent that interest is ordered paid on sums due under this decision and order, such interest shall also be paid on the added compensation that the Employer must pay.

ORDER

1. The decision and order granting Claimant compensation benefits, which was issued April 21, 1978, and supplemented May 19, 1978, in Case No. 77-LHCA-1230 (OWCP No. 1-21689) is ratified as to all payments made for the period terminating at the close of business on August 17,

1978, and vacated for the period beginning on August 18, 1978 and continuing through May 19, 1981.

2. Beginning on August 18, 1978, and ending on the date of the informal conference with the deputy commissioner, the Employer shall pay to Claimant as additional comensation an amount equal to 10% of each unpaid installment of compensation that became due within that period of time. This decision and order has specified the criteria for the computation of the findings as to the compensation benefits that were, in fact, paid at a lower rate at those times. The record does not contain the date of the informal conference before the deputy commissioenr. This claim is remanded to the deputy commissioner to make an appropriate finding as to the date of the

informal conference and to compute the amount of the payments to be made in compliance with 33 U.S.C. 914 (e).

3. Subject to offset and deduction for any payments voluntarily made, the Employer/Carrier shall pay to the Claimant benefits for temporary total disability at the rate of $160.80 per five day week beginning August 18, 1978 and ending at the close of Employer's business on March 18, 1979 at the rate of 6% per annum from the date each such payment was due until paid.

4. Subject to offset and deduction for any payments voluntarily made, the Employer/Carrier shall pay to the Claimant benefits for temporary partial disability at the rate of $64.32 per five-day week, beginning on March 19, 1979, and ending at the close of

Employer's business on February 4, 1980, together with interest on all sums due thereon at the rate of 6% per annum from the date each such payment was due until paid.

5. Subject to offset and deduction for any payments voluntarily made, the Employer/Carrier shall pay to the Claimant benefits for permanent partial disability at the rate of $64.32 per five day week, beginning on February 5, 1980, together with interest on all sums due thereon at the rate of 6% per annum from the date each such payment was due until paid. Such payments shall cease to be paid by the Employer/Carrier when it has completed not less than 104 weekly payments.

6. After 104 weeks, Claimant's compensation for such partial permanent disability at the rate of $64.32 per five day week shall be paid out of the Special Fund, pursuant to 33 U.S.C. 908 (f) and such other provision of the Act as shall be applicable under the circumstances of this case.

7. The Employer/Carrier shall make payments as required by 33 U.S.C. 907 to compensate for the cost of reasonably necessary medical services and supplies furnished and to be furnished to the Claimant in connection with this job-related injury.

8. The Employer/Carrier shall pay to Claimant's counsel such fee as shall hereafer be ordered pursuant to the application for approval of attorney fee to be sumbitted by counsel for the

Claimant under 20 CFR 702.132. Counsel is ordered to make service of such application on counsel for the Employer/Carrier and on the Deputy Commissioenr, as required under 20 CFR 702.233 (a) and (b). Employer/Carrier will have 10 days from the date of such service to oppose, reply or comment upon that application.

Frederick D. Neusner
Aministrative Law
Judge

Dated: January 23, 1981
Washington, D.C.

APPENDIX F

39 M.R.S.A. §54*

Compensation for total incapacity.

While the incapacity for work resulting from the injury is total, the employer shall pay the injured employee a weekly compensation equal to 2/3 his average gross weekly wages, earnings or salary, but not more than the average weekly wage in the State of Maine as computed by the Employment Security Commission; 133 1/3% of such average weekly wage as of July 1, 1977; 166 2/3% of such average weekly wage as of July 1, 1979; and 200% of such average weekly wage as of July 1, 1981; nor less than $25 weekly; and such weekly compensation

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*Some statutory provisions in Maine were amended subsequent to Mr. Bouford's injury. The parties agree that the amendments have no impact on this case. See App. supra. p. 33.

shall be adjusted annually on July 1st so that it continues to bear the same percentage relationship to the average weekly wage in the State of Maine as computed by the Employment Security Commission, as it did at the time of the injury. In the following cases it shall, for the purposes of this Act, be conclusively presumed that the injury resulted in permanent total incapacity; the total and irrevocable loss of sight of both eyes, the loss of both hands at or above the wrist, the loss of both feet at or above the ankle, the loss of one hand and one foot, an injury to the spine resulting in permanent and complete paralysis of the arms or legs or an injury to the skull resulting in incurable imbecility or insanity. In the event of such permanent total incapacity,

the employer shall pay the employee a weekly compensation equal to 2/3 his average gross weekly wage, earnings or salary but not more than the average weekly wage in the State of Maine as computed by the Employment Security Commission; 133 1/3% of such average weekly wage as of July 1, 1977; 166 2/3% of such average weekly wage as of July 1, 1979; and 200% of such average weekly wage as of July 1, 1981; nor less that $25 weekly; and such weekly comensation shall be adjusted annually on July 1st so that it continues to bear the same percentage relationship to the average weekly wage in the state of Maine as computed by the Employment Security Commission, as it did at the time of the injury. If the said totally incapacitated employee dies, as a result

of this injury, leaving dependents who were dependent upon his earnings at the time of his injury, then payment shall be made to said dependents in accordance with the procedures established by section 58.

Whenever a program of vocational or educational rehabilitation has been inaugurated, either by approved agreement or commission decree, the employer shall pay the injured employee, in addition to compensation, if he is totally or partially incapacitated, a sum not to exceed $35 per week for sustenance and travel as may be determined by the commission during the period of such rehabilitation within the limitations as prescribed in this section and section 32.

39 M.R.S.A. §55

Compensation for partial incapacity.

While the incapacity for work resulting from the injury is partial, the employer shall pay the injured employee a weekly compensation equal to 2/3 the difference, due to said injury, between his average gross weekly wages, earnings or salary before the injury and the weekly wages, earnings or salary which he is able to earn thereafter, but not more than the average weekly wage in the State of Maine as computed by the Employment Security commission; 133 1/3% of such average weekly wage as of July 1, 1977; 166 2/3% of such average weekly wage as of July 1, 1979; and 200% of such average weekly wage as of July 1, 1981; and such weekly compensation shall be adjusted annually on July 1st so that it continues

to bear the same percentage relationship to the average weekly wage in the State of Maine as computed by the Employment Security commission, as it did at the time of the injury.

39 M.R.S.A. §56

Compensation for particular injuries; permanent impairment.

In addition to the benefits provided for in sections 54 and 55, when an employee sustains an injury which is included in the following schedule, the incapacity in each case shall be deemed to be total for the period specified and the injured employee shall receive a lump sum payment for said injury which shall be determined by multiplying the amount to which he would be entitled weekly for total incapacity as determined under section 54, by the period of presumed total incapacity set forth in this section. The specific periods of presumed total incapacity because of injuries in this section shall be as follows:

For the loss of a thumb, 50 weeks.

For the loss of the first finger, commonly called the index finger, 32 weeks.

For the loss of the 2nd finger, commonly called the middle finger, 28 weeks.

For the loss of the 3rd finger, commonly called the ring finger, 20 weeks.

For the loss of the 4th finger, commonly called the little finger, 17 weeks.

The loss of the distal (second) phalanx thumb or the distal (third) phalanx of any finger shall be considered to be equal to the loss of 1/2 of said thumb or finger, and the compensation therefor shall be 1/2 the amount above specififed. The loss of more than one phalanx shall be considered as the loss of the entire thumb or finger. In no case shall the amount received for the loss of a thumb and more than one finger

of the same hand exceed the amount specified in this schedule for the loss of a hand.

For the loss of the great toe, 25 weeks.

For the loss of one of the toes other than the great toe, 10 weeks.

For the loss of the distal (second) phalanx of the great toe or of the distal (third) phalanx of any other toe shall be considered to be equal to the loss of 1/2 of said great toe or any other toe, and the compensation therefore shall be 1/2 the amount specified. The loss of more than one phalanx shall be considered as the loss of the entire toe.

For the loss of a hand, 165 weeks.

For the loss of an arm, or any part thereof above the wrist, 200 weeks.

For the loss of a foot, 165 weeks.

For the loss of a leg, or any part thereof above the ankle, 200 weeks.

For the loss of an eye, or the reduction of the sight of an eye, with glasses, to 1/10 of the normal vision, or for diplopia, 100 weeks.

For the loss of both eyes, or the reduction of the sight of both eyes, with glasses, to 1/10 of the normal vision or for diplopia, 300 weeks.

For the total and permanent loss of hearing in one ear, 50 weeks.

For the total and permanent loss of hearing in both ears, 200 weeks.

In all other cases of injury to the above-mentioned members, eyes or hearing where the usefulness of any physical function thereof is permanently impaired, the specific compensable periods for presumed total incapacity on account thereof shall bear such relation to the periods above specified as the percentage

of permanent impairment due to the injury to such members, eyes or hearing shall bear to the total loss thereof. The commission upon petition therefor by either party shall determine such percentage. A petition for determination of the percentage of permanent hearing impairment due to an injury shall be filed with the commission within 2 years from the date of the injury.

The commission may award proper and equitable compensation for serious facial or head disfugurement not to exceed $7,500, including a disfigurement continuous in length which is partially in the facial area and also extends into the neck region. The commission, if in its opinion the earning capacity of an employee has been or may in the future be impaired, may award compensation for any

serious disfigurement in the region above the sterno clavicular articulations anterior to and including the region of the sterno cleido mastoid muscles on either side, but no award for the total disfigurement as set forth shall, in the aggregate, exceed $7,500. Notwithstanding any other provision hereof, 2 or more serious disfigurements, not continuous in length, resulting from the same injury, if partially in the facial area and partially in the neck region as described in the preceding sentence, shall be deemed to be a facial disfigurement.

39 M.R.S.A. §56-A.

Injuries.

In addition to the benefit provided for in sections 54 and 55, when an employee sustains an injury which is included in the following schedule, the incapacity in each case shall be deemed to be total for the period specified and the injured employee shall receive a lump sum payment for said injury which shall be determined by multiplying the amount to which he would be entitled weekly for total incapacity as determined under section 54, by the period of presumed total incapacity because of injuries specified in this section shall be as follows:

Total loss of function of

Neck: 100 weeks

Back: 200 weeks

Jaw: 40 weeks

Genito-urinary organs: 100 weeks.

In all other cases of injury to the above-mentioned parts of the body where the usefulness of any physical functioin thereof is permanently impaired, the specific compensable periods for presumed total incapacity on account thereof shall bear such relation to the periods above specified as the percentage of permanent impairment due to the injury to such parts of the body shall bear to the total loss thereof. The commission upon petition therefor by either party shall determine such percentage.

Such determination by the commission shall be based upon reasonably demonstratable medical or clinical findings.

APPENDIX G

33 U.S.C. §903 (e)

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' comensation law or section 20 of the Act of March 4, 1915 (38 Stat. 1185, chapter 153; 46 U.S.C. 688) (relating to recovery for injury or death of seamen) shall be credited against any liability imposed by this Act.

33 U.S.C. §908 (c)

Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this sectin respectively and shall be paid to the employee as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.
(2) Leg lost, two hundred and eighty-eight weeks' compensation.
(3) Hand lost, two hundred and forty-four weeks' compensation.
(4) Foot lost, two hundred and five weeks' compensation.
(5) Eye lost, one hundred and sixty weeks' compensation.
(6) Thumb lost, seventy-five weeks' compensation.
(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.
(9) Second finger lost, thirty weeks' compensation.
(10) Third finger lost, twenty-five weeks' compensation.
(11) Toe other than great toe lost, sixteen weeks' compensation.
(12) Fourth finger lost, fifteeen weeks' compensation.
(13) Loss of hearing:

(A) Compensation for loss of hearing of one ear, fifty-two weeks.

(B) Compensation for loss of hearing of both ears, two hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof; only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otlaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 12 of this Act, or a claim for compensation, under section 13 of this

Act, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

(14) Phalanges: compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be proportionate loss of use of the member.

(20) Disfigurement: proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfugurement of the face, head or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in this class of disability, the compensation shall be 66 2/3 per centum of

the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability.

(22) In any case in which there shall be a loss of, or loss of use of more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member of part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 10(d)(2), the compensation shall be 66 2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 2(10), payable during the continuance of such impairment.

Supreme Court, U.S.
FILED
DEC 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-841

In The

Supreme Court of the United States

October Term, 1986

BATH IRON WORKS CORPORATION,

and

COMMERCIAL UNION INSURANCE COMPANY,

Petitioners,

vs.

BRUCE E. BOUFORD,

Respondent.

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The "Question Presented" by the Petitioner describes a ruling of the Maine Supreme Judicial Court that was not made. If any question is to be decided, which respondent opposes, it would be: whether the Maine Supreme Judicial Court was correct in ruling that the appropriate credit to be given by the Maine Workers' Compensation Commission against previously received LHWCA benefits is a question governed by State law, and not governed by 33 U.S.C. § 903(e).

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STATEMENT OF THE CASE

The facts of this case are clearly set forth in the majority opinion of the Court below. Petition for Writ, p. 1-a. Also, it is important to the Petition before the Court that the weekly benefits for partial incapacity awarded by the LHWCA Administrative Law Judge and the Maine Workers' Compensation Commissioner were, respectively, $64.32 and $40.13. The employer did not actually have to pay the employee any Maine weekly benefits because of the credit allowed by the Maine Commissioner for the previously paid LHWCA benefits. Petition for Writ, p. 44-a. However, the employer wanted to apply the unused credit of $24.19 per week against the permanent impairment award of $16,053 also awarded by the Maine Commissioner pursuant to 39 M.R.S.A. § 56-A. See Petition for Writ, pp. 12-a - 13a.

—o—

REASONS FOR DENYING THE WRIT

1. The Decision Below Turns Upon its own Facts.

The decision below turns upon its own facts. It will affect few litigants in Maine, and probably none outside of Maine. This case would have ended at the initial Commissioner level except for one unfortunate fact: the Federal Administrative Law Judge awarded to the employee $64.32 per week and the single Maine Workers' Compensation Commissioner awarded the employee $40.13 per week with appropriate inflation adjustments. This minor and temporary[1] difference accounts for this whole case.

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[1] In Maine this adjustment would transform an award of $40.13 in 1979 to a weekly award of a little more than $64.32 in 1985. 39 M.R.S.A. § 55.

The difference was the result of an accident, a tactical error, and is unlikely to repeat itself in the future.

First, it was an accident. The federal Administrative Law Judge did not state in his decree what percentage of partial benefits he was awarding. The state Commissioner awarded 25% benefits and stated:

> This specific finding of partial incapacity was awarded with knowledge that the employee has been receiving federal workers' compensation at a roughly equivalent rate and time period. (Petition for Writ, pp. 35a-36a.)

Apparently the single state Commissioner was under the impression that the federal award had been roughly 25%, probably due to an argument early in the case by employee's counsel, when actually the federal award was 39%.

Secondly, the difference in the two awards was the result of a tactical error on the part of employee's and, perhaps, employer's counsel. When the employee filed his state petition for partial benefits in 1984, the level of his incapacity back to March of 1979 was res judicata. Both parties to this litigation had been parties to the federal litigation at which the level of partial incapacity was the principal issue. (Petition for Writ, p. 45-a.) The matter had been fully and completely litigated and either party in the state proceedings could have required the state agency to accept the level of partial incapacity established by the federal decision. *Thomas v. Washington Gaslight*, 448 U.S. 261 (1979). In hindsight that is what counsel for the employee should have done.

If the Maine Commissioner had ordered the same amount of partial weekly incapacity benefits under Maine

law as had been awarded under the federal decree, as was his general intention, then there could be no reasonable dispute about the additional permanent impairment award made under 39 M.R.S.A. § 56-A. This is so because the employer would have been able to fully offset the $64.32 that had been paid since 1979 against the identical amount of weekly benefits that hypothetically would have been awarded by the Maine Commission. Thus, the permanent impairment award made by the Maine Commission under § 56-A would have clearly been complimentary and supplementary to the Federal Act, a superior benefit of the type clearly contemplated by *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 724 (1980).

The facts in this case are admittedly different. The State Commissioner did not award the same amount of weekly partial benefits as the Federal Administrative Law Judge did. But this fact is unlikely to repeat itself. Either party can avoid it by invoking res judicata. If they do not, a State Commissioner will be inclined, as was the Commissioner in this case, to make the same finding on percentage of incapacity for the same period as did a previous Federal Administrative Law Judge between the same parties.

Neither employees or employers are entitled to what they received in this case: two administrative trials concerning the level of incapacity for the same period of time. Thus, this case presents an unusual, probably unique, set of facts which is unlikely to be repeated.

There is a second peculiarity to this case. Maine is one of only a few states which adds to weekly incapacity benefits without any time limit a "permanent impairment"

benefit. Thus, Maine's permanent impairment benefit under 39 M.R.S.A. § 56-A is a benefit wholly unrelated to lost earning capacity. An employee does not have to miss even a single day of work in order to receive a permanent impairment award. The question of whether or not such a benefit is complementary and supplementary to LHWCA benefits, such that the federal benefits should not be offset against them, is one that will be rarely faced. Indeed, since *Sun Ship* was decided in 1980 research has not revealed any substantial litigation, state or federal, concerning this issue.

Thus, a decision of the issue presented in this case will affect few litigants because this case turns on its own peculiar facts.

2. There Are No Conflicting Decisions On The Issues Presented.

There are no conflicting decisions on the issue presented. The Petition cites only one case that even dealt with a crediting issue. *Landry v. Carlson Moring Services,* 643 F.2d 1080 (5th Cir. 1981), cert. denied, 454 U.S. 1123 (1981). However the case is distinguishable. It deals with what a Federal Administrative Law Judge should allow as a credit when a state has previously made a workers' compensation award, not vice-versa as in the instant case. Moreover, the rationale and result in the case support the respondent, not the petitioner. In *Landry* the Court denied a credit to an employer for that portion of the state compensation award which the employee had to pay to his attorney as attorneys' fees, even though the money came out of the employee's award of benefits. The Court held that to credit that amount against LHWCA

benefits would be to "mix apples and oranges." Id at 1088. Secondly, the Court implied that if the attorneys' fees had been a "separate element of damages" under Texas law rather than having been simply taken out of the state compensation award, the answer would have been more clearly that no credit should be allowed. Id. Maine's permanent impairment award is clearly a "separate element of damages." Thirdly, the Court cited *Globe Indemnity Company v. Calbeck*, 230 F.Supp. 14 (S.D. Tex. 1960), in which the Federal Court refused to allow a credit against LHWCA benefits for monies advanced to the employee by the employer before formal state compensation began, a credit allowed by Texas against Texas benefits but not allowed by the Administrative Law Judge against LHWCA benefits. Id at 17.

Thus, the Petitioner has not presented a single case in its Petition that either (1) concerns a state tribunal crediting LHWCA benefits against state compensation benefits, the situation in the instant case; or (2) shows a federal tribunal imposing a credit against LHWCA benefits for apparently dissimilar state benefits previously received. Therefore, this Court should not review the matter in the first instance, but leave the issue to development and consideration of the different State and District Courts. The matter is not ripe for the establishment of a nationwide principle of federal law.

3. The Decision Is Correct On Other Grounds.

The decision below is correct on other grounds. The Court would be unlikely to reach the question sought to be raised by the Petition. This is so for four reasons.

First, there can be no dispute that any permanent impairment award under state law made in this case is a benefit under Maine law that has no relationship to lost earning capacity. This is definitively established as a matter of *state law* by the Court below and is not reviewable.

Second, the state court below ruled that *as a matter of state law* credit would not be given against the award of permanent impairment for LHWCA benefits the employee had previously received for loss of weekly earning capacity. Indeed, a major point of the dissenting opinion in the decision below was a disagreement about state law. Petition for Writ, pp. 18-a - 19-a. It is clear that what divided the State judges below was the proper construction of the state statute: whether the Maine Workers' Compensation Act should be construed to require a credit in some circumstances and prohibit it in others.

No Supremacy argument has been made as yet that calls into question the constitutionality of the Maine Act. The heavily veiled suggestion that 33 U.S.C. § 903(e) federalizes the law of crediting is heavily veiled because a plain view of it would be repugnant. Since under *Sun Ship* states are free to provide more favorable benefits than the federal ones, and since the LHWCA does not pre-empt the field of compensation to harbor workers, then it is clearly a question of *state law* how much of a federal award a state chooses to credit against a state award or how much a state chooses to supplement the federal award. A state could, for example, provide for employer liability to employees for disfigurement, rehabilitation, child allowances, or other losses not covered by LHWCA. In or-

der for the State to assure that an employee receives these special benefits under state law, it is obviously necessary to prohibit these special compensations to be withheld because the employee has received a separate and distinct benefit under Federal law not compensating similar losses.

Thirdly, 33 U.S.C. § 903(e) upon which the petitioner rests almost its entire case provides as follows:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this Act.

This was § 3(b) of the 1984 Amendments, and applied to "claims filed after [Sept. 10, 1984] and to claims pending on such date." Longshore & Harbor Workers' Compensation Act Amendments of 1984, § 28. Since Mr. Bouford's "claim" for federal benefits had been adjudicated in 1981, three years before the Amendments, and since no claim has been filed with the federal agency since the Amendments, section 903(e) can have no relevance to this case.

Finally, the petitioners have no standing to seek a credit against the state permanent impairment award because they have not made the payments they seek credit for. All of the federal payments since February 5, 1982 have been made out of the Special Fund established pursuant to 33 U.S.C. § 908(f). Petition for Writ, pp. 79-a. Thus, the petitioners have made payments of $64.32 per week under the Federal Act from March 19, 1979 to February 5, 1982. The credit that they were allowed by the Maine Commissioner against a state weekly compensation award of $40.13 from March 19, 1979 to the present and

continuing, was the full amount of federal benefits paid since March 19, 1979. Petition for Writ, p. 37-a. This was in excess of what the petitioners themselves paid. If anyone is entitled to a credit against the state award, it is not the petitioners. They didn't pay it. They shouldn't receive it back. They lack standing.

For all the above reasons, it is unlikely that this Court would reach the question presented.

4. The Questions Presented Were Not Raised Or Preserved Below.

The petitioner argues:

> . . . the Court below went beyond its own legitimate policy interests and attempted to interpret the meaning or intent of the statutory provisions of the Longshore & Harbor Workers' Compensation Act, with which the State Court is neither involved nor familiar.

Petition for Writ, pp. 21-22. The argument was made repeatedly, not only to the lower Court, but to all three levels below that the State tribunals were not qualified to construe or intrepret the Federal Act.

It is difficult to see how petitioner raised his federal question when he argued that the state authorities ought not to have attempted to construe the LHWCA.

5. The Decision Below Was Correct.

The decision below was correct, for all the reasons listed by the majority opinion of the Maine Supreme Judicial Court. The Maine Act complements the Federal Act by compensating an injured worker for a loss that the Federal Act does not compensate; namely, intangible

losses to his personal life occasioned by an injury which is permanent. The Maine Court correctly found that the Federal Act has no such benefit. 33 U.S.C. § 908(c)(21) compensates wage loss only. *Potomac Electric Power v. Director Office of Workers' Compensation Programs,* 449 U.S. 268, 282, 283 (1980). Moreover, benefits under that section are "permanent" only in the sense that they continue until interrupted by a subsequent administrative order. Meanwhile, they are "payable during the continuance of partial disability." 33 U.S.C. §§ 908(c)(21); 908(h).

The petitioner's assertion that these permanent partial benefits were "in addition to whatever temporary total or temporary partial disability may occur from time to time" is totally unfounded. Even a casual reading of the statute, or the opinions of this Court, or the decision of the Court below, or the record in this case reveals the contrary: an employee may receive at one time either temporary partial benefits or permanent partial benefits, but not both. 33 U.S.C. § 908(c)(21), § 908(e); *Potomac Electric Power v. Director, Office of Workers' Compensation Programs, supra;* Petition for Writ, p. 3-a, 77-a. Thus, the award made under the LHWCA does not remotely resemble Maine's benefit.

Congress has apparently not decided to give a fixed award regardless of the effect of an injury on earning capacity, at least where that injury is to the back. 33 U.S.C. § 908(c)(1)-(20); Petition for Writ 8-a - 9-a. Maine has decided the opposite. *Sun Ship Inc v. Pennsylvania, supra,* intends that an employee may have superior state benefits that are complementary to the federal scheme and not duplicative. 447 U.S. 715, 724 (1980). To subtract from

this unique state award benefits for lost earning capacity paid under the Federal Act would be precisely to defeat that state complementary award. Just as state awards for disfigurement, rehabilitation, child allowances, or attorneys fee should not be undone because an employee has received an award under the Federal Act, so too Maine's permanent impiarment award is separate and distinct element of damages. To hold otherwise is to enforce the doctrine of "election of remedies" which this Court has squarely rejected. *Sun Ship v. Pennsylvania, supra.*

CONCLUSION

The question presented in the Petition is not of such substantial importance that plenary consideration is required. The Supreme Judicial Court of the State of Maine was clearly correct in its judgment and the Petition should be summarily denied.

Dated at Portland, Maine this 22 day of December 1986.

Respectfully submitted,

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